FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-752

T.L. BAKER,

Petitioner

v.

LINNIE CARL MCCOLLAN,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

(The respondent as the following brief indicates does not believe that the following issues framed by the petitioner accurately portray any of the issues in this case, but since petitioner framed the issues, respondent, to avoid confusion, will adopt them. In addition, question number 2 is inaccurate in that respondent has *not* conceded the good faith of Sheriff Baker).

1. Whether a failure to have established administrative procedures which might have secured the release of respondent is actionable under 42 U.S.C. § 1983 absent intent to injure, knowledge of facts requiring action or deliberate indifference to consequences of inaction when the respondent was arrested and confined in good faith reliance on a valid warrant.

2. Whether, as a matter of law, the sheriff should be entitled to qualified immunity from claims made under 42 U.S.C. § 1983 when the good faith of the sheriff is conceded and the reasonableness of the arrest and confinement is supported by a validly issued warrant in the name of respondent.

3. Whether an official "causes or subjects" one to a deprivation of his rights merely because he has failed through simple negligence to institute a procedure to uncover mistakes of others which were the causes, in fact, of the deprivation.

STATEMENT OF THE CASE

Sometime in 1972, unknown to respondent, Linnie Carl McCollan, his brother, Leonard McCollan, procured a duplicate of the respondent's Texas Driver's License containing Leonard's picture but respondent's name and date of birth. Throughout 1972 Leonard McCollan lived in Amarillo (Potter County, Texas) and throughout 1972 and 1973 the respondent, Linnie Carl McCollan, lived in Dallas, Dallas County, Texas. After the procurement by Leonard McCollan of the

forged ficticious driver's license, Leonard McCollan used this license as his own in Potter County. (SOF 147-148). On or about October 6, 1972, Leonard McCollan was arrested in Potter County for sale of narcotic drugs and placed in the Potter County Jail. (S.O.F. 38-39; Plt. Exh. #1). At the time of this arrest the Potter County Sheriff's Office determined that they had photographs and fingerprints of Leonard McCollan that had been procured by the Potter County Sheriff on another arrest of Leonard McCollan on September 11, 1972. (S.O.F. p. 38-41; Plf. Exh. #2, 3, and 4). The Potter County Sheriff's Office booked Leonard McCollan into the Potter County Jail as Linnie Carl McCollan and further, since Leonard McCollan had appropriated the respondent's name, the warrant that was the authority for placing him in jail was also in the name of Linnie Carl McCollan.

Also, on October 6, 1972 a Potter County Sheriff's Deputy determined that the driver's license referred to above was altered; i.e., the Sheriff's Deputy determined that the picture on the altered driver's license was not the man whose name and date of birth appeared on the driver's license for evidence and for identification purposes (S.O.F. 45-46; 116-118, Plf. Exh. 5).

Shortly after Leonard McCollan was arrested he arranged for a professional bondsman to post his bail and he was released. On November 3, 1972, this bondsman sought and received an order allowing him to surrender his principal and a warrant was issued

for the arrest of Leonard McCollan. It must be remembered, however, that the warrant issued pursuant to this request was in the name of the respondent, Linnie McCollan because Leonard McCollan was using his brother's name. Leonard McCollan then disappeared and the warrant has apparently never been served on him.

On December 26, 1972, the respondent, Linnie Carl McCollan was in the City of Dallas driving for a mail messenger service and was stopped by a City of Dallas Police Officer and issued a traffic citation for running a red light. In the process of issuing this ticket the Dallas Police Officer learned by radio of the arrest warrant in the name of Linnie McCollan in Amarillo (Potter County, Texas) and caused the respondent to be arrested and placed in the City of Dallas Jail. The Dallas Police Officer called petitioner Baker's office and notified them of the arrest of Linnie McCollan (S.O.F. 138-146). On December 30, 1972, deputies from petitioner Baker's office arrived in Dallas and took custody of the respondent and drove him to Amarillo and then placed the respondent in the Potter County Jail. From the time of respondent's arrest and incarceration on December 26, 1972, until his release on January 2, 1973, respondent insisted that he was *not* the man they wanted and further *that a mistake had been made.* On January 2, 1973, in the late afternoon, the respondent was released (S.O.F. 141; 145; 152).

The release of the respondent took place because while respondent had insisted that he was not the man Potter County wanted he was ignored until January 2, 1973. The sheriff and his deputies finally, after several days' delay, compared the wanted man's photo and finger prints in their files with the respondent and readily determined that respondent was not the man they wanted.

At trial, petitioner Baker testified as follows (S.O.F. 68-69):

> BY MR LARSON:
>
> Q Shortly after this incident occurred you made a determination of the standard kind of operating procedure in counties the size of Potter County do in regards to when someone is arrested outside the county; isn't that true?
>
> A Yes.
>
> Q So the procedure you found out was that mug shots and fingerprints would be mailed down as soon as notice of a warrant—notice of arrest to someone wanted under a warrant; isn't that the standard procedure?
>
> A It would either be mailed or taken down.
>
> Q Yes. Well, did any of your deputies mail anything down to Dallas to the Dallas Police Department?
>
> A No, sir.
>
> Q Did either of your deputies take mug shots or were the fingerprints with them when they came down to Dallas to pick him up?

A No, sir. Not to my knowledge.

Sheriff Baker also testified that it was the procedure of his office to photograph and fingerprint prisoners upon their arrest (S.O.F. 31-33) and that a file is kept in his office on each person arrested and in this file folder are kept photographs and fingerprints of each prisoner. Sheriff Baker testified that his office had such a file folder with Leonard McCollan's picture and fingerprints contained therein and that the file containing the pictures and fingerprints of the man actually wanted were readily accessible to the sheriff and his deputies in the jail. (S.O.F. 108-110). Linnie McCollan and Leonard McCollan do not resemble each other in appearance.

At trial, Sheriff Baker testified thusly (S.O.F. 110-111):

Q It's not important for you in your county to find out if you have got the right person or not?

A Yes, that's the reason that it would be necessary for you to take the time and go through the process to make sure who you were talking to in jail if there was some doubt.

Q Sheriff, it took you four days to figure out you had the wrong man?

A There was four days elapsed, there, yes.

Q It would have been a simple thing to just open up the file and look at the picture and you would have known instantaneously that you had the wrong person, right?

A No, the picture alone wouldn't have done it.

Q Why not?

A You need to go through all of your file and you need to know who you are talking to, who you had in jail.

Q Well, now, you're not telling the jury that Plaintiff's Exhibit Three looks like the man sitting over there, are you?

A No.

Q Well, what is it? I don't understand it. What is it that would have been so hard for you to have pulled out that photograph and looked at this man and said it wasn't the same person?

A Okay. What we had to do or would have had to have done would be to pull the folder out and make sure by fingerprints and everything that we had the correct picture in the file.

Q Well, you had fingerprints, too, didn't you?

A Yes, so it would be necessary for us to have, you know, both of them.

Q Well, if you had pulled the file out and found the picture in there, you would have been kind of worried, you would have done some further checking immediately, isn't that right?

A Yes, sir.

Q But nobody did that in your jail, isn't that right, until four days later?

A That's right.

At the close of all of the evidence the trial court instructed a verdict for defendant apparently for the reason that the trial court believed that as a matter of law Sheriff Baker was entitled to rely on the warrant.

SUMMARY OF ARGUMENT

Respondent does not believe that this case is a case involving negligence but rather is one involving the intentional tort of false imprisonment. Respondent believes that this case more appropriately involves Sheriff Baker's failure to supervise his deputies and his jail and Baker's intentional failure to establish policies to avoid the incarceration of respondent. Alternatively, respondent believes that the sheriff is liable because of deliberate indifference to the rights of respondent. Respondent further suggests in some proper cases negligence is actionable under § 1983 and respondent believes that the defense of good faith is not available to the petitioner under the facts of this case.

ARGUMENT

I.

This Is Not A Mere Negligence Case Because This Case Involved A Deprivation Under The Constitution And Involves The Protected Right To Be Free From Unlawful Imprisonment And The Record And Law Does Not Support The Contentions Of Petitioner That This Is A Negligence Case.

Counsel for petitioner misperceives the issues in this case and apparently the opinion in the court below as a case involving negligence.[1] In the opinion of the respondent this is really a case involving the intentional tort of false imprisonment and the failure of Sheriff Baker to supervise his deputies and manage his jail. The opinion in the court below speaks for itself. The word negligence does not even appear in the court's opinion. The court below in *McCollan* v. *Tate*, 575 F.2d 509 (5th Cir. 1978) said as follows:

> *Bryan* made clear that in a section 1983 false imprisonment action the reasonable good faith of the sheriff comes into play only as a defense. To make out a prima facie case, a plaintiff need show only: (1) intent to confine; (2) acts resulting in confinement; and (3) consciousness of the victim of confinement or resulting harm. 530 F.2d at 1213, citing Restatement (2d) Torts § 35 (1965). There can be no doubt that the sheriff's deputies intended to confine and did confine the plaintiff. Similarly, there can be no doubt that plaintiff

[1] It is significant to note that counsel for the petitioner apparently did not perceive that negligence may be a reason for avoiding § 1983 liability until oral arguments at the fifth circuit. When the court asked both counsel what effect, if any, did counsel believe that effect of a possible nonactionable negligence holding under § 1983 in *Procunier* v. *Navarette* would have on this case. (At the time of oral arguments the opinion in *Procunier* had not been delivered.) There was no motion to dismiss filed stating negligence as a reason for avoiding § 1983 liability in the trial court, there was no mention of it as a means to avoid § 1983 liability in this arguments to the trial court (see S.O.F. pp. 210-241), there is no direct mention of negligence in his answer filed in the trial court (App. 1-6) and counsel opposites' briefs in the Fifth Circuit make no mention of negligence either. In fact the main thrust of petitioner's argument in the Fifth Circuit was that Sheriff Baker could rely on the warrant.

was aware of the fact that he was being held in jail. Since the deputies' action were authorized by Sheriff Baker and the same actions were in keeping with the policies of the Potter County Sheriff's Department at that time, plaintiff established his prima facie case against Sheriff Baker. See *Jennings* v. *Patterson*, 460 F.2d 1021 (5th Cir. 1972). Cf. *Rizzo* v. *Goode*, 423 U.S. 362, 96 S. Ct. 598, 46 L.Ed 2d 561 (1976) (Supervisory officials not subject to injunction under section 1983 where no showing that they authorized or approved lower officials' misconduct). Assuming arguendo that the actions and intent of the deputies are not properly attributable to the sheriff,[2] on the facts of this case plaintiff was entitled to go to the jury on the basis of Sheriff Baker's own action or inaction. To incur liability under section 1983 a state official need not directly subject a person to a deprivation of his constitutional rights. The language of the statute[3] and the holdings of this court make clear that he can be held liable if he causes the plaintiff to be subjected to a deprivation of his constitutional rights. See *Sims* v. *Adams*, 537 F.2d 829 (5th Cir. 1976). Sheriff Baker's failure to require his deputies to transmit the identifying material described above "caused" plaintiff's continued detention. Plaintiff has made out a prima facie case under *Bryan*, and Sheriff Baker can escape liability only if he acted in reasonable good faith. As the court said in *Bryan*, "[i]f [the sheriff] negligently establishes a . . . system in which errors of this kind are likely, he will be held liable." 530 F.2d at 1215.

> The only real question in this case is whether the sheriff's failure to introduce a policy of sending photographs and fingerprints identity upon his arrival or during his stay at Potter County Jail was unreasonable.[4]
>
> (Footnotes omitted.)

To properly analyze this case it is more appropriately viewed on two levels. The first level is the actions or inactions of the sheriff and/or the sheriff's predecessor in office in failing to cause the name on the warrant to be changed or alternatively making it known that the name on the warrant was in error. The record in the trial court makes it abundantly clear that the sheriff and/or his deputies or at least the sheriff's predecessor in office and the predecessor's staff knew or should have known that the person actually wanted (Leonard) was not using his real name. It is undisputed that no one made any effort to correct the name on the warrent. The second level on which this case should be analyzed is what the sheriff did when the respondent was imprisoned and the sheriff became aware of the imprisonment and then what the sheriff did when the respondent came into his custody or subject to his control. The second level of analysis is clearly where the Fifth Circuit focused its intention in its opinion.[2] See the full opinion in *McCollan* v. *Tate*, *supra*.

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[2] In fact this has been McCollan's position from the beginning. Counsel for petitioner made it clear in his oral arguments to the trial court (S.O.F. 230-238) in response to the sheriff's motion for

To further emphasize and clarify the respondent's position enunciated above, McCollan's § 1983 claim against the sheriff is not for the wrong name being placed in the warrent or the failure to discover and change same or even the initial arrest of the respondent, but rather for the intentional failure to investigate and determine that the wrong man was imprisoned. This case is a false imprisonment case and thus one involving an intentional "tort." See the Restatement of Torts Second, § 44. Negligence is certainly present in the case at the first level indicated above but it does not in respondent's view determine the outcome of respondent's § 1983 claim on the second level. *Whirl* v. *Kern*, 407 F.2d 781 (5 Cir. 1969) at page 792, states the law which respondent believes which controls this case is as follows:

> . . . The tort of false imprisonment is an intentional tort. Restatement of Torts, Second, § 44. It is committed when a man intentionally deprives another of his liberty without the other's consent and without adequate legal justification.

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instructed verdict and in his oral argument in the 5th Circuit that Mr. McCollan's case was clearly predicated on what actions Sheriff Baker took after McCollan was incarcerated and not what happened prior to the arrest. Additionally, respondent was relying on the following language in *Whirl* v. *Kern*, 407 F.2d 781 at 792 (5 Cir. 1969):

> The sheriff, of course, must have some protection too. His duty to his prisoner is not breached until the expiration of a reasonable time for the proper ascertainment of the authority upon which his prisoner is detained. We are to be interpreted as holding that a sheriff commits an instant tort at the moment when his prisoner should have been released.

> *Roberts* v. *Hecht Co.*, D.Md.1968, 280 F.Supp. 639, 640; *Browning* v. *Pay-Less Self Service Shoes, Inc.*, Tex.Civ.App. 1963, 373 S.W. 2d 71 (no writ); 32 Am.Jur.2d, False Imprisonment § 1 (1968).

Sheriff Baker acted in the role as the respondent's surrogate jailer in Dallas as well as his real jailer in Potter County and, as such, his duties to the respondent are not based in negligence but are intentional acts. It is clear that the Restatement of Torts Second § 125 (1965)[3] places the duty upon Sheriff Baker to exercise due diligence in making sure that person imprisoned is actually the person wanted. Without

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[3] The text of § 125 and comment (d) reads as follows:

> § 125. Name or Description of Person Arrested Under Warrant
> An arrest under a warrant is not privileged unless the person arrested
> (a) is a person sufficiently named or otherwise described in the warrant and is, or is reasonably believed by the actor to be, the person intended, or
> (b) although not such person, has knowingly caused the actor to believe him to be so.
>
> . . .
>
> d. Two persons with same name. An error in an additional initial or its omission or erroneous insertion is not important, unless the actor knows or should know that there are two persons to whom the Christian name and surname are equally applicable. If there are two such persons—as also if there are two persons to whom the name applies with complete accuracy or with substantially equal sufficency—the actor is privileged to arrest the one whom, after using due diligence, he reasonably believes to be the person intended.

In addition to the "Restatement" see 127 A.L.R. 1057-1066; 10 A.L.R. 2d 750-757; and *False Imprisonment* 25 Tex Jur 2d§ 36.

doubt the court below recognized the sheriff's duty as should this Court in the opinion of respondent. An officer who causes the arrest or detention of the wrong person mentioned in a warrant is liable for false imprisonment. *Landrum* v. *Wells*, 26 SW 1001 (Tex. Civ. App. 1894); *Clark* v. *Winn*, 46 SW 915 (Tex. Civ. App. 1898); *Schnaufer* v. *Price*, et al, 124 SW2d 940 (Tex. Civ. App. 1939). The officer assumes the risk and hazard of the imprisoned person being the wrong one and it is no defense that the name of the person imprisoned is the same. *Wolf* v. *Perryman*, 17 SW 772 (Tex. S.Ct. 1891). In *Wolf* v. *Perryman* the sheriff arrested the plantiff on a warrant from another county for murder. The sheriff delivered the plaintiff to a deputy from the county from which the warrant issued. The plaintiff had the same name as was in the warrant. The court in this case said that the arrest was the peril of the sheriff from the beginning. See also *Inmon* v. *Mississippi* 278 F 23 (5th Cir. 1922). Again see *Whirl* v. *Kern*, 407 F.2d 781 (5th Cir. 1969) at 792 for further clarification.

> Ignorance and alibis by a jailer should not vitiate the rights of a man entitled to his freedom. A jailer, unlike a policeman, acts at his leisure. He is not subject to the stresses and split second decisions of an arresting officer, and his acts in discharging a prisoner are purely ministerial. Moreover, unlike his prisoner, the jailer has the means, the freedom, and the duty to make necessary inquiries. While not a surety for the legal correctness of a prisoner's commitment. *Ravenscroft* v. *Casey*, 2 Cir. 1944, 139 F.2d 776, cert.

> denied, 323 U.S. 745, 65 S.Ct. 63, 89 L.Ed. 596; *DeWitt* v. *Thompson*, 1942, 192 Miss. 615. 7 So.2d 529, he is most certainly under an obligation, often statutory,[11] to carry out the functions of his office. Those functions include not only the duty to protect a prisoner, but also the duty to effect his timely release.

Many who have read and commented on *Whirl* v. *Kern, supra*, have classified it as a negligence case but respondent does not believe that conclusion is justified. *Whirl* involved a former prisoner's suit under § 1983 against Sheriff Kern for keeping Whirl imprisoned for over nine months after his case had been dismissed and the authority for holding him had terminated. The claim was false imprisonment, an intentional tort, not negligence. The jury in *Whirl* was given negligence instructions as the case was in the Fifth Circuit because of these erroneous instructions as the jury had found that Sheriff Kern was not negligent. The court in *Whirl* held that Whirl was entitled to a directed verdict for the intentional tort of false imprisonment. As in *Whirl* the respondent believes that this case at bar involves intentional action and an intentional tort.

The leading case in the Fifth Circuit on a sheriff's liability in a false imprisonment case under § 1983 is *Bryan* v. *Jones*, 530 F.2d 1210 (5th Cir) (enbanc), cert denied 429 U.S. 865 (1976). *Bryan* was decided after *Whirl* and in essence affirmed the holdings in *Whirl* and stated that if a sheriff establishes a system under

which errors a likely to falsely imprison a man, the sheriff is liable. *Bryan* unlike *Whirl* did establish a good faith defense if the sheriff relied on errors made outside his realm of responsibility. The *Whirl* court had decided that good faith was not a defense to false imprisonment under any circumstance. Here in the case at bar the sheriff cannot rely on *Bryan* because the errors were of his own making, i.e. Sheriff Baker failed to establish a system to (1. forward the "mug shots" and fingerprints to "Dallas" and/or establish and enforce a system of comparing the "mug shots" and fingerprints with the prospective prisoner.

II.

The Facts Of This Case Support The Conclusion That Sheriff Baker Exhibited "Deliberate Indifference Toward McCollan.

Respondent suggests there is a possible second method of justifying the results reached in the 5th Circuit in the case at bar. *Estelle* v. *Gamble*, 429 U.S. 97 (1976) stated the standard for § 1983 cases under the Eighth Amendment to the Constitution. The court in *Estelle* v. *Gamble* created the standard of "deliberate indifference" in cases where prisoners are complaining about treatment and conditions in prisons. Isolated acts of negligence are not actionable but acts that indicate "deliberate indifference" are.

From reading the petitioner's brief one could conclude that the plaintiff quietly accepted his predicament and from his arrest to his release told no one he

was the wrong man. This is definitely not the case because it is undisputed that the plaintiff told every police officer and sheriff's representative that he came into contact with that he was not the wanted man and told everyone that a mistake had apparently been made. All of the plaintiff's protests were ignored and no one made any further inquiry or investigation. As stated many times before the sheriff had pictures of the wanted man, Leonard McCollan, and no one compared them to the respondent. The Fifth Circuit even noted that there was no resemblance between the real Leonard and Linnie. Respondent submits that the sheriff and his deputies ignored the plaintiff's protests and as such showed "deliberate indifference" or "reckless disregard" to his right not to be subjected to imprisonment. *Estelle* v. *Gamble, supra.* Surely the right not to be falsely imprisoned when the person causing the imprisonment has the means readily at hand to ascertain that the wrong man is imprisoned is actionable under § 1983. Under our system a man's liberty is too precious for a sheriff to escape liability especially when the mistake is so easily discovered and the jailer so readily ignores his protests.

III.

In Certain Situations Negligence Is Actionable Under § 1983.

Respondent does not believe that this case involves negligence but concedes that one could possibly read the Fifth Circuit's opinion in the court below as a

mere negligence case and/or disagree with the assertions made above. However, it is respondent's position that under certain circumstances that negligence is actionable under § 1983. Authority for this position is found in *Monroe* v. *Pape,* 365 U.S. 167 (1961) an opinion where Justice Douglas writing for eight members of the Supreme Court concluded after an exhaustive examination of legislative history of § 1983 that "by reason of prejudice, passion, *neglect, intolerance or otherwise,* state laws might not be inforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the 14th Amendment might be denied by state agencies" 365 U.S. 180. (Emphasis added). Indeed the statute itself on its face has no limitation of what kind of actions can be brought under it. Even those who supported it in Congress indicated there were no limitations; E.g. a comment in *Monroe* v. *Pape,* 365 U.S. at 174 N.10 indicates thusly:

> The speaker, Mr. Arthur of Kentucky, had no doubts as to the scope of § 1: "[I]f the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a soraph, for a mere error in judgment [he is liable] . . . (emphasis in original)

The apparent underlying purposes of § 1983 are to deter infringement of constitutionally protected rights and compensate those who were damaged. The

Supreme Court concluded in *Monroe* v. *Pape, supra,* that Congress by no means wished to limit the remedial effects of this statute to a narrow focus on purely intentional conduct by state officials. *Monroe* and its progeny properly teaches us that § 1983 was designed by Congress to protect federal rights and the failure to provide the protection of federal rights by state officials neglectful and otherwise.

Several courts on the circuit level subsequent to *Monroe* v. *Pape* have accepted various forms of "negligence" or unintentional conduct under § 1983. For example, see *Hoitt* v. *Vitek,* 497 F.2d 598, 602 n.[4] (1st Cir. 1974); *Howell* v. *Cataldi,* 464 F.2d 272, 279 (3d Cir. 1972); *McCray* v. *Maryland,* 456 F.2d 1, 5-6 (4th Cir. 1972); *Jenkins* v. *Averett,* 424 F.2d 1228, 1232-1233 (4th Cir. 1970); *Parker* v. *McKeithen,* 488 F.2d 553, 556 (5th Cir. 1974) cert. denied, 419 U.S. 838 (1974); *Roberts* v. *Williams,* 456 F.2d 819 (5th Cir. 1971), cert. denied, 404 U.S. 866 (1971); *Whirl* v. *Kern,* 407 F.2d 781, 787-789 (5th Cir. 1969) cert. denied, 396 U.S. 901 (1969); *Fitzke* v. *Shappell,* 468 F.2d 1072, 1077 (6th Cir. 1972); *Puckett* v. *Cox,* 456 F.2d 233, 234-235 (6th Cir. 1972); *Spence* v. *Staras,* 507 F.2d 554, 557 (7th Cir. 1974); *Byrd* v. *Brishke,* 466 F.2d 6, 10-11 (7th Cir. 1972); *Joseph* v. *Rowlen,* 402 F.2d 367, 369-370 (7th Cir. 1968); *Dewell* v. *Larson,* 489 F.2d 877, 881-882 (10th Cir. 1974); *Daniels* v. *Van De Venter,* 382 F.2d 29, 31 (10th Cir. 1967); *Stringer* v. *Dilger,* 313 F.2d 536, 540-541 (10th Cir. 1963); *Carter* v. *Carlson,* 447 F.2d 358, 365 (D.C. Cir. 1971), reversed on other grounds, 409 U.S. 418 (1973); *Bryan* v. *Jones,*

530 F.2d 1210 (5th Cir 1976) (en banc) cert. denied 429 U.S. 865 (1976). It should be noted that some of the above "negligence" cases received tacit approval because certioraris denied by the Supreme Court. The Supreme Court's opinions since *Monroe* v. *Pape* do not engraft a state of mind requirement on to claims under § 1983. While *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), and *Wood* v. *Strickland*, 420 U.S. 308 (1975) do set qualifying mental states in relation to defenses or immunities, these requirements possess common ground with the law of negligence and were drawn from it and do not require that plaintiffs in § 1983 claims need to show intent on the part of the defendants. The apparent thrust of *Pierson, Scheuer* and *Wood* is that negligence standards apply in § 1983 cases and that a state official has a duty to not take unreasonable risks when dealing with the constitutional rights of citizens and state officers are required to be aware of the Constitution and not make unreasonable assumptions about their conduct in relation to the Constitution. Despite what the opinion seems to indicate, respondent submits that *Estelle* v. *Gamble*, 97 S. Ct 285 (1976) is actually a case that stands for the proposition that § 1983 liability is established where a series of negligent acts or a pattern of negligent conduct is plead and proven because such a pattern of conduct would properly lead to a finding that the official responsible evidenced "deliberate indifference" or in fact, had acted with negligence. In essence the federal courts are required to step in § 1983 suits

when constitutional rights are infringed whether they be done negligently or intentionally. The constitutional rights of citizens are no less deprived if the deprivations were accomplished through negligence rather than through intentional acts.

Lower federal courts have, as indicated above, recognized negligence claims and nonintentional acts but they have done so cautiously and have required that a real constitutional issue be involved. A good example of this is *Roberts* v. *Williams, supra*, where the fifth Circuit held that a supervisor could be held to account for the "failure to train and supervise" a trustee who negligently shotgunned the plaintiff, but in *Bonner* v. *Conghlin*, 545 F.2d 565 (7th Cir. 1976) (en banc) the court held that a negligent loss of a trial transcript by prison guards leaving the door open to the prisoner's cell was not actionable. *Roberts* v. *Williams, supra*, involved a substantial constitutional right but *Bonner* v. *Conghlin, supra*, did not. *Bonner* involved no due process violation but *Roberts* did. If a police officer runs a red light and injures a citizen, no constitutional right is involved; but if a jailer negligently or nonintentionally imprisons the wrong man, respondent submits that is actionable under § 1983 because it is an affront to the Constitution.

Another modifier on the nonintentional or negligence claim under § 1983 is the nature of the claim itself. In *Estelle* v. *Gamble, supra*, the Supreme Court focused on the nature of the constitutional provision

involved. The way the 8th Amendment is expressed requires more than mere negligence but a series of acts which result in "deliberate indifference." Respondent does believe that the framers of the Constitution regarded a man's liberty and the protection of his liberty as paramount under the Constitution and respondent believes the authors of § 1983 envisioned that a claim such as that of the respondent's is actionable under § 1983, whether it involves negligence or not.

Briefly stated, respondent does not believe that the petitioner has made a good case for rejecting § 1983 suits because of nonintentional acts or negligence. Not even the flood of potential new litigation argument is valid in light of the lower court's careful scrutiny of "negligence" claims under § 1983. This scrutiny coupled with limitations placed on § 1983 as indicated above by *Estelle* v. *Gamble, supra*, have not opened the door to "auto collision" type cases being brought under § 1983. To allow negligence actions under § 1983 does not in any way alter the other requirements for maintaining § 1983 claims, i.e. the § 1983 plaintiff must still convince the trial court (1) that the wrong was committed under color of state law; (2) that the injury caused deprivation of right, privilege or immunity recognized by the Constitution. These requirements coupled the well established principles of tort law are adequate bridles on the plaintiff's lawsuit under § 1983.

IV.

Sheriff Baker Has The Duty To Supervise His Deputies And Supervise The Jail.

Sheriff Baker has also asserted that because he wasn't personally aware of the respondent's incarceration and because he didn't personally participate in the actions causing respondent's incarceration he shouldn't be held liable or in other words he was under no duty to supervise his deputies or his jail or initiate policies and procedures to insure only the right persons would be incarcerated. Since the sheriff is the head of his department and has the authority to hire and fire his deputies[4] and a Texas Statute[5] places the responsibility for the operation of the jail on his shoulders, it appear obvious that this position is just not tenable. This Court in *Monell* v. *New York Dept. of Social Services,* 436 U.S. 658 concluded that after reviewing the legislative history for § 1983 that the word "persons" in § 1983 encompassed local govern-

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[4] Generally see V.A.T.S. Articles 6865-6877 and Sheriff Constables etc., 52 Tex Jur 2nd 283-373.

[5] See V.A.T.S., Articles 5115-5118. Article 5116 that was in effect on the relevant dates involved herein provides as follows:

> Art. 5116. Sheriff and Jailer
>
> Each sheriff is the keeper of the jail of his county. He shall safely keep therein all prisoners committed thereto by lawful authority, subject to the order of the proper court, and shall be responsible for the safe keeping of such prisoners. The sheriff may appoint a jailer to take charge of the jail, and supply the wants of those therein confined; but in all cases the sheriff shall exercise a supervision and control over the jail.

mental entities. This Court went further and said monetary damages can be recovered from the local government itself when the damages resulted from the implementation of policies and procedures put into effect by the local government. This Court limited recovery however to cases where policies and procedures caused the damages and not just because the tort feasor was employed by the local government. Here if the sheriff had implemented the policy of mailing and/or taking mug shots and fingerprints to cities where persons who were arrested and incarcerated pursuant to warrants from Potter Coutny, the respondent would not be before this Court. Further, had Sheriff Baker enforced and implemented the procedure of comparing photos, etc. in his files against the prisoner as the prisoner was being placed in his jail the respondent's claim would not be as damaged or the sheriff might have avoided liability altogether. The sheriff has complete control over his department and has the power to make the decisions and policies by which his department is operated. Unless he violates some state or federal law no one can interfere with his operation of the department and especially his operation of the jail. A Texas sheriff is elected by the people and is answerable only to them, except through misfeasance is office. His duties are statutorily defined but the internal operation of the sheriff's department and jail are solely in the discretion of the sheriff. Respondent does not believe that *Rizzo* v. *Goode*, 423 U.S. 362 (1976) gives the sheriff any solace either. Respondent suggests the "affirmative

link" between the respondent's incarceration and the misconduct of the sheriff need go no further than the sheriff's failure to institute the policies enumerated several times above which would have effectuated the timely release of the respondent. In addition, the Fifth Circuit case, *Whirl* v. *Krn, supra*, cited many times above gives a thorough and exhaustive treatise on the responsibility of a Texas sheriff in relation to his imprisoned charges.

The circuit courts have on several occasions rendered opinions which placed responsibility on the shoulders of the supervisor for failure to properly or adequately supervise their inferiors. See *Roberts* v. *Williams, supra*. Where the 5th Circuit held a prison official responsible for the failure "to train and supervise" a prison trusty. In *Byrd* v. *Briskke*, 466 F.2d 6 (7th Cir. 1972) the Seventh Circuit reversed a directed verdict for the defendant police officers and the supervisory officers who failed to protect the plaintiff from beatings. Also see *Dewell* v. *Larson*, 489 F.2d 877 (10th Cir. 1974), which is a case not unlike the one at bar. Here the 10th Circuit reversed a dismissal of § 1983 claim against a police chief who allegedly failed to supervise his inferiors in the jail when the chief failed to establish procedures where jail personnel would be apprized of missing persons. The plaintiff alleged that had this procedure been in effect a diabetic missing person would not have been classified as a drunk. *Parker* v. *McKeithen*, 488 F.2d 553 (5th Cir. 1974), cert denied, 419 F.2d 838 (1974) is a case

where a prison warden was said to have failed in his supervision of his subordinates and allowed conditions to exist which made it possible for the § 1983 plaintiff to be injured by another inmate. *Sims* v. *Adams*, 537 F.2d 829 (5th Cir. 1976) and *Bryan* v. *Jones, supra*, are also failure to supervise cases which supports respondent's position.

It is also interesting to note that the Texas Supreme Court in the case *McBeath* v. *Campbell*, (Tex Com App 1929) 12 S.W. 2d 118 held that a Texas sheriff that was sued for false imprisonment who defended on the grounds that he didn't know the plaintiff was in his jail was not a defense. The Texas Commission of Appeals in an opinion approved by the Texas Supreme Court ruled that the sheriff's knowledge of his charge was not a valid defense to false imprisonment because Texas Statutes (V.A.T.S. Art. 5116) make the sheriff the keeper of the jail and "it is his (the sheriff's) duty to know by what authority he is confined therein, and he (the sheriff) cannot close his eyes and fail to make investigation and excuse himself on the lack of knowledge," 12 S.W. 2d at 123. Certainly § 1983 liability cannot be less. See *Whirl* v. *Kern, supra*, and *Bryan* v. *Jones, supra*.

V.

Good Faith Is Not Available As A Defense Under The Facts Presented Here.

Finally, Sheriff Baker asserts that he is entitled to qualified immunity and there should not be liable be-

cause he acted in good faith. This Court in *Pierson* v. *Ray, supra*, said the following:

> . . . but thisholding, which related to requirements of pleading, carried no implications as to which defenses would be available to the police officers, As we went on to say in the main paragraph, § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S., at 187. Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause.
>
> "We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983." *Pierson* v. *Ray, supra*, 386 U.S. at 556.

Since that opinion § 1983 defendants have attempted to extend the good faith immunity doctrine to themselves. However, respondent believes that there is no sound reason in law to extend the immunity doctrine to Sheriff Baker under the facts of this case. As pointed out above, respondent is not complaining about his arrest, rather the respondent's complaint concerns the failure of the sheriff to timely cause his release and concedes to Sheriff Baker an appropriate amount of time to discover the error in identification. If one accepts the respondent's view of the case as a false imprisonment case then *Monroe* v. *Pape, supra*

and *Pierson* v. *Ray, supra*, are not authority to extend the good faith immunity to this case. Both *Monroe* and *Pierson* are false arrest cases and respondent concedes that good faith is available in false arrest situations. But this case involves the intentional tort of false imprisonment and "good faith" is not a defense under tort law for false imprisonment. *Whirl* v. *Kern, supra*, the rationale for giving the good faith defense to false arrest cases is that the police officer making an arrest is usually involved in a stressful situation which calls for discretion, speed, and an on-the-spot evaluation. Therefore, a certain latitude must be given to him so as to avoid unjust results for a honest mistake. Here the facts are much different. Respondent is content to wait until the sheriff had time to get the fingerprints and photos to Dallas. There is no pressure to make snap discretionary decisions but merely that the sheriff initiate and enforce policies and procedures to insure only the proper persons are incarcerated. Here the sheriff's duty is clear. He is only authorized to imprison the man actually wanted, not the respondent. The sheriff's duty to timely release is even clearer because his deputies ignored respondent's protests that he wasn't the wanted man.

At this juncture it is necessary to correct a statement that petitioner has made in his application for certiorari and elsewhere to the effect that the respondent has conceded the good faith of the sheriff. *Respondent has not made such a concession.* Respondent will concede there is no evidence in the record that

Sheriff Baker maliciously sought to imprison McCollan, but that is not to say that the respondent concedes that the sheriff intentionally failed to establish a simple procedure for ascertaining the true identify of persons who are arrested pursuant to Potter County arrest warrants. Neither does respondent concede the good faith of the sheriff's office in intentionally ignoring his statements that he was the wrong man.

Even if the petitioner is correct in his position that he is entitled to assert the qualified immunity of good faith; it is clear that that is only a defensive issue. *Pierson* v. *Ray, supra,* and *Bryan* v. *Jones, supra.* This case was taken from jury on an instructed verdict for reasons other than which the case is here before this Court. If the case is sent back for another trial only then will it come into play; good faith has not been established as a matter of law.

Of course if one wishes to view the actions of Sheriff Baker as nonintentional or negligent, then in the opinion of the respondent, good faith is not available as a defense. Judge Swygert of the 7th Circuit clearly indicated that good faith is not defensable in negligence in a dessent in *Bonner* v. *Coughlin, supra*, at page 573, as follows:

> This argument collapses upon examination. Its underlying premise is that good faith is nothing but the absense of bad faith, and since an official can only act in bad faith when he is acting intentionally, a nonintentional act can never be in bad

faith. While it may be true that a nonintentional act cannot be in bad faith, it is *not* true that good faith is simply the absence of bad faith. Good faith requires that "[t]he official himself [is] acting sincerely and with a belief that he is doing right." *Wood*, 420 U.S. at 321. Such as affirmative belief is only possible with respect to intentional acts. It is nonsensical to speak of commiting a negligent act in good faith.

CONCLUSION

For the foregoing good and sufficient reasons the decision of the Court of Appeals to return this matter for a new trial should be affirmed.

Respectfully submitted,

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